IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO. 3 OF 1990

The State of Maharashtra .. Appellant (Orig. Complt.)

Versus

Ayub Musa Shaikh .. Respondent (Orig. Accused)

Mr.P.A. Pol APP for the State
Mr.S.K. Chourasia Advocate for the Respondent.

CORAM : D.G. DESHPANDE, & S.R. SATHE, JJ.
DATED : 02nd February, 2007

ORAL JUDGEMENT :- (PER S.R.SATHE,J.)

1. The State of Maharashtra has preferred this appeal as against the judgement and order passed in Sessions Case No. 16 of 1988 by the Sessions Judge, Kolhapur whereby the accused was acquitted of the offence punishable under section 302 of IPC.

2. The brief facts giving rise to this appeal are as under :-

The complainant Surrayya Ayub Shaikh was residing with the present accused as his wife, though according to her they were not actually married. Admittedly, out of their association Surrayya had three daughters from the accused. The accused often used to

drink liquor and pick up quarrels with Surrayya. As against this, it is the case of the accused that as Surrayya was doing business as prostitute, there used to be quarrel. It is the case of the complainant Surrayya that being fed up with the harassment of the accused, she deserted him and started residing with one Salim Shaikh (deceased in this case) in Sadar Bazar area and thereafter, she shifted to Waddwadi. They had taken one hut on rental basis. Surrayya's daughters were also residing with her.

3. On 26/09/1987, in the evening Surrayya had gone to the dispensary of Dr. Shingade alongwith deceased Salim Shaikh. They returned at about 8 to 8.30 pm. At that time, the accused called Salim out of the house and started giving knife blows on his chest and stomach. Seeing accused assaulting Salim in such manner, Surrayya rushed to the Rajarampuri Police Station and brought police at the spot. By the time, they rushed to the spot, accused had disappeared from the said place and Salim was lying in a pool of blood. He was dead. Surrayya then went to the Police Station and lodged the complaint stating therein that she was initially residing with the accused. He was harassing her hence she left and started residing with Salim and

at the relevant time, accused called Salim and then assaulted him with knife. Police registered C.R. No.138 of 1987 against the accused at 9.00 pm. Police then immediately drew the inquest panchanama Exh-9 and sent the dead body for postmortem. Police also drew the panchanama of the place of offence. When complainant Surrayya had initially went to the Police to inform them that the accused is assaulting her husband Salim, PSI had sent some constables in search of Salim and PSI and some constables went to the spot. It is the prosecution case that when four constables had gone in search of accused Ayub as he was already known to them, they found that accused was concealing himself behind petrol pump, near Maratha Bank. Police noticed that clothes which were on the person of the accused had blood stains. They therefore called panchas and attached the said clothes and at that time, accused was also found in possession of one button knife which had also blood stains. The said articles were produced in the Police Station. Police then recorded statement of various witnesses and also sent the attached property to C.A. They also received the P.M. Report wherein it was opined that death of Salim was caused due to shock and due to multiple injuries to the vital organs. After completion of the investigation, police submitted

charge-sheet against the accused in the Court of Chief Judicial Magistrate, Kolhapur for the offence punishable under section 302 of IPC.

4. Finding that accused was charge-sheeted for the offence which was exclusively triable by the Court of Sessions, the learned CJM committed the case to the Sessions Court, Kolhapur. The learned Sessions Judge, Kolhapur framed charge-sheet Exh-2 against the accused for the offence mentioned above. Accused pleaded not guilty and claimed to be tried. His defence was of total denial.

5. In order to bring home the guilt of the accused, the prosecution examined as many as 11 witnesses consisting of eye witness PW-1 complainant Surrayya Ayub Shaikh Exh-15, alleged eye witnesses Malan Powar and Narayan Powar (Exh-17 and 18), two panch witnesses namely Rajaram Patil and Baban Chavan Exh-19 and 20, witness Bibijan Salim Shaikh, wife of deceased Exh-22, police constable Hindurao Desai Exh-23, other police constable Arjun Khot who took the articles to C.A. Exh-25, Dr. Vithal Bhosale who did the autopsy Exh-26, Police Naik Ajit Ghatge Exh-27 and the Investigating Officer PI Shivanna Hundekari Exh-28.

The prosecution also produced the inquest panchanama Exh-9, panchanama of place of offence Exh-10, P.M. Report Exh-12, FIR Exh-16, C.A. Report Exh-32. All this evidence will be discussed in detail in further discussion as and when necessary.

6. It is not in dispute that at one point of time complainant Surrayya was residing with the accused and she had three daughters from the accused. It is also not disputed that thereafter, Surrayya started residing with the deceased Salim. It is an admitted fact that police drew the inquest panchanama Exh-9 at 9.30 pm on the date of incident and at that time, several injuries were found on the person of Salim. The postmortem report is produced at Exh-12 wherein Doctor has given the external injuries in Column No.17 of the said report. The said injuries are as under.

> *17) 1) Incised wound – over sterum. Starting from manubrium and going vertically down 4″ in length. Skin deep. Bloody==*
>
> 2) Stab wound – one inch to the Rt. of midline in the 3rd intercostal space ¾″ x ½″ and 4″ deep bleeding ++
>
> 3) Stab wound – on Lt. side of chest in mid claricular line in 3rd intercostal space ½″ x ¼″ x 1″ bleeding ++

4) Stab wound – on (Lt.) side of chest 2″ away from midline in the 7th space ¾″ x ¼″ x 3″ bleeding ++

5) Stab wound – (Lt.) side of chest. 1″ lateral and ¼″ above injury No.4-1/2″ x ¼″x 2″ bleeding ++

6) Stab wound over epigastrium ¼″ x ¼″ x ½″ bleeding+

7. Doctor who carried the postmortem namely Dr. Bhosale Exh-26 has also stated that there were corresponding internal injuries. The same are mentioned in Column No.18. He has categorically stated that all those injuries were antimortem. Thus, from the above evidence the learned Trial Judge has rightly held that the death of Salim is homicidal. In fact, the defence has also not at all contended that the death of Salim was not homicidal.

8. The main and the material question is whether the said death was caused at the hands of the accused ? Shri Pol, learned APP strenuously argued before us that learned Sessions Judge has not properly appreciated the evidence of the eye witness Surrayya Shaikh and has disbelieve her testimony merely on the ground that she was doing prostitute business and convicted for the same on several occasions. It was also argued on behalf

of the defence that there was also other circumstantial evidence to corroborate the testimony of eye witness and under such circumstances, evidence of Surrayya ought to have been accepted. He, therefore, submitted that the reasons given by the learned Sessions Judge for discarding the testimony of Surrayya Shaikh are not legal and proper and as such the evidence of said eye witness be accepted and the accused be held guilty of the offence with which he is charged.

9. As against this, Shri Chourasiya, learned Advocate appointed as per the order of this Court to defend the accused submitted that though alleged incident has taken place on the public road and there was possibility of several other witnesses having seen the incident, nobody has come forward to support the prosecution case. Two witnesses examined by the prosecution have turned hostile. The panchas have also turned hostile. So, the evidence with regard to the attachment of the clothes and weapon from the accused can not be accepted and evidence in that behalf can not be relied upon. He, therefore, submitted that learned Trial Judge has rightly held that the prosecution has failed to prove beyond reasonable doubt that the accused committed the murder of Salim. According to

him, the view taken by the learned Trial Judge can not be said to be impossible or perverse. It is the possible view and as such this Court should not interfere in this appeal against the acquittal.

10. It is needless to say that prosecution case mainly rests on the sole testimony of complainant Surrayya Shaikh. She has categorically stated that on the day of incident at about 8 to 8.30 pm when she and deceased alongwith her daughter returned from the dispensary of Dr. Shingade and reached near home, the accused Ayub Shaikh came there. He asked Salim to come with him and thereafter, he gave blow with knife on his chest. She thereafter went to Rajarampuri Police Station to call police. It must be noted that admittedly accused is the person with whom Surrayya had stayed for some years and she had three daughters from him. So, he was certainly in a position to identify the accused. Though, a feeble attempt has been made on behalf of defence to show that at the relevant time, there was dark, from the panchanama of place of offence it is very clear that very near from the place where the incident took place, there is street light and it was switched 'On' at the relevant time. Not only that but in the adjoining house also there was some light.

Besides this, accused was not a stranger, so there was difficulty for Surrayya to identify the accused in such light. In fact, if we carefully read the entire evidence of Surrayya then it is nowhere even specifically suggested to her that at the relevant time she was not present at the place of offence. When such is the position, question arises why Surrayya should leave aside the real culprit and named the present accused. However, we find that the learned trial Judge has not taken into consideration this aspect but has discarded her evidence by making following observations.

> *" As it has been observed by the Supreme Court in the matter of Shivajirao Bobade V/s. State of Maharashtra, Supra, the single testimony should be of honest man. In this case, it can not be said so. Because Surrayya herself admitted that she is doing the prostitution and maintaining herself by it. Surrayya admitted that she has been convicted and sentenced by the Court for soliciting the customers for prostitution. She has admitted that in many cases she has been caught by the Laxmipuri Police Station for doing the prostitution. Keeping in view this aspect,*

how it can be said that the evidence of this eye witness on which the prosecution is very much relying upon for conviction is of an honest man or honest woman."

11. We are really unable to swallow this reasoning of the learned Sessions Judge. How a woman who is doing prostitute business can be labeled once for all as dishonest woman merely because she is a prostitute. Merely because a woman under compelling circumstances or even otherwise carrying on the business of prostitution can not be said to be a dishonest woman. On the contrary, we find that in the instant case, the complainant Surrayya has specifically admitted that she is doing prostitute business and is in fact maintaining her daughters on the income of prostitution business. She has also not denied that previously she has been convicted for carrying on prostitution business. So, she is in fact frankly admitting the position and has no tendency to suppress the truth. Even the Apex Court has also held that merely because a witness has been convicted previously that does not necessarily mean that he is a dishonest person or his testimony can not be relied upon. Ultimately, whether a particular witness is honest witness or not shall have to be

determined from his entire evidence and the facts and circumstances. It must be brought on record in the cross-examination of such witness to show that he is not a truthful witness. He is a person who changing his version from time to time to suit his own purpose or that he is deposing at the instance of some other person. That should be the touchstone to find out whether witness is honest or not. But if there is nothing in cross examination of such witness to show that he has made any improvements or that there are omissions and contradictions, then, merely because the complainant Surrayya is carrying on business of prostitution and is convicted for the same previously, we are not at all inclined to hold that she is dishonest witness. On the contrary, the facts and circumstances of this case clearly go to show that the evidence of Surrayya in this case is trustworthy.

12. The complainant Surrayya has stated that immediately after the time she saw accused assaulting Salim with knife, she rushed to the Police and called them. The evidence of Hindurao Desai Exh-23 and PI Shivanna Hundekari Exh-28 also indicates that Surrayya had been to Police Station immediately after the incident and she named the accused as the assailant.

Not only that, it is an admitted fact that in the instant case complaint has been lodged and registered at 9.00 pm i.e. immediately after the incident. There is absolutely nothing in record to show that the time mentioned in the complaint is not correct or that it was not registered at the time which is shown in the complaint. Once the evidence is clear on the point that the complaint in the instant case is lodged immediately after the incident, then due weightage shall have to be given to such complaint wherein name of the accused is mentioned. We can not ignore the fact that the complainant is a rustic lay woman. It is very difficult to believe that immediately after the time she saw Salim being assaulted it would struck to her to take advantage of the said situation and rope the accused with whom she had lived earlier and left after few years. The prompt lodging of FIR by the complainant Surrayya is a very important circumstance which goes to show that the testimony of Surrayya is reliable and trustworthy. It indicates that there was in fact no time for her to think over the matter and hatch a plan to involve the accused falsely. However, unfortunately the learned Trial Judge has not at all taken into consideration this important fact that the complaint is lodged immediately after the incident wherein the

complainant Surrayya has named the accused. He has also lost sight of the fact that genuineness of the FIR is in fact not challenged in the instant case. So under such circumstances FIR can not be discarded or distrusted. Even in a case **Sarwansingh V/s. State of Punjab AIR 1976 Supreme Court 2304** the Apex Court has held that where the genuineness of the FIR is not challenged during the cross-examination, there is no suggestion put to the Investigating Officer or Duty Officer that he fabricated or manufactured documents, the documents can not be distrusted.

13. The evidence of complainant Surrayya is not at all shaken or shattered in cross examination so as to distrust her testimony or label her as dishonest woman. On the contrary, the promptness in lodging the report justifies the inference in the circumstances of the case that the report was not concocted story. Where soon after occurrence, FIR is lodged, it is difficult to believe that false story was cooked up. It has been so held in **Bhaksingh V/s. State of Punjab 1971 Cri. L.J. 903**. There is catena of rulings in which it has been said that if the First Information Report is made very soon after the occurrence i.e. undoubtedly, a circumstance in favour of prosecution. For this

proposition, useful reference can be made to a case **Asaram Vithal Singh Pardeshi V/s. State of Maharashtra AIR 1971 Supreme Court 1315**. So, having regard to this aspect and all the material on record, we have no hesitation to hold that the reasoning adopted by the learned Sessions Judge for discarding the testimony of eye witness Surrayya is not at all legal and correct.

14. From the perusal of the judgement of the learned Sessions Judge it appears that the fact that prosecution did not adduce sufficient evidence to prove the motive has weighed heavily while holding tat the testimony of the eye witness can not be relied upon. It is pertinent to note that the prosecution has examined PW-6 Bibijan Shaikh Exh-22. It is an admitted fact that she is the wife of Salim Shaikh (deceased). However, from the evidence on record it is also very clear that Salim Shaikh had started residing with Surrayya and he was in fact doing the work of giving protection to prostitutes and taking them to certain places. Witness Bibijan has stated that about three months prior to the incident once accused Ayub had met her and he had told her that she should control Salim. In other words, she should not allow Salim to stay with Surrayya otherwise he would kill Salim. It is true that the said witness

has admitted in cross examination that he had not informed her husband that Ayub had given threat that he would commit his murder but there is nothing on record to disbelieve her testimony at least to the extent that Ayub i.e. accused had met her few months prior to the incident and had asked her to control Saleem and thereby accused had suggested some animus against Salim. So we find that as complainant Surrayya had left Ayub and started residing with Salim, accused might have some grievance against Salim and that may be the motive. Be that as it may, one can not ignore the fact that it is well settled that where the positive evidence against the accused is clear, cogent and reliable, the question of motive is of no importance. It has been so held in **Gurucharan Singh V/s. State of Punjab AIR 1956 Supreme Court 540**. So, even if it is held in the instant case that the prosecution has failed to prove the motive for the crime, that is not sufficient to weaken the testimony of eye witness.

15. Incidently it must be noted that even the Apex Court has observed in **Dalbir Singh V/s. State of Punjab AIR 1987 Supreme Court 1328** that if a witness is not a man of character above suspicion, merely on this ground his testimony could not be rejected when he was

examined during investigation immediately after occurrence. The case of Surrayya is in fact on better footing. There is convincing evidence to show that she lodged the complaint immediately after the occurrence and named the present accused as assailant.

16. Much is made about the fact though the alleged incident has taken place in open space on a road, there are other witnesses. However, it must be noted that the prosecution had in fact, examined two other witnesses namely Malan Powar and Narayan Powar in whose house Surrayya and Salim were residing. Admittedly, their house is hardly at a distance of 15' from the place of offence and it is the prosecution case that the incident in question was also seen by these two witnesses. Their statements were also recorded by police but unfortunately, both these witnesses turned hostile. It is needless to say that it is usual experience that even if the incident has occurred in brought day light in the crowdy area, prosecution finds it difficult to bring eye witness. This is obviously because of the tendency of the people not to come forward to depose about such incident which they have seen. People are afraid of giving evidence or even to have any connection with any case. So, when we find

that other two alleged eye witnesses have turned hostile, the testimony of complainant Surrayya who is also an eye witness to the incident can not be disbelieved merely because of the fact that she was previously convicted for the prostitute business or that she was residing with the deceased and her testimony is not supported by other alleged eye witnesses.

17. There is another important piece of evidence which also lends support to the prosecution version. Police Constable Hindurao Desai Exh-23 has specifically stated that on the date of incident he was in the police station. Surrayya came there and told police that Salim was assaulted by Ayub and so some constables were asked to go and catch Ayub and accordingly constables had gone in search of Ayub and they found that accused was concealing himself behind petrol pump, near Maratha Bank. They caught him at that place. There is no reason to disbelieve the evidence of these police constables. Nothing has been brought on record to show that police had any animus against the accused or that they wanted to rope him by hook or crook. When such is the position, there is no reason why police should falsely implicate the accused. Police Constable Desai

has categorically stated that at that time, other police constable was with him and he called panch and then panchanama Exh-42 was drawn and the clothes on the person of accused which were blood stained were attached. So also accused was found in possession of knife which was also blood stained and it was also seized by the police. Police Constable Hindurao Desai Exh-23 has duly proved the panchanama Exh-42. It is true that the said panchanama was not signed by him. But we can not ignore the fact that the said panchanama was signed by the other police constable who died subsequently in the accident and as a result of the same Police Constable Hindurao Desai who had actually taken part in the arresting the accused was required to prove handwriting of the said Police Constable who drew the panchanama Exh-42 regarding attachment of the clothes and knife. Merely because the panchas for the said panchanama have turned hostile one can not jump to the conclusion that evidence with regard to this panchanama is fabricated. It is true that the prosecution could not adduce satisfactory evidence to show that at the relevant time Police had actually carried with them sealing material but it seems that Police Constable Hindurao Desai Exh-23 might not have given correct facts regarding actual sealing of the

articles. But that by itself is not sufficient to discard the entire story that the police that they found the accused at such place and then he was taken to police station and the clothes and the knife which was found with the accused had blood stains. It has also come on record that the attached articles weer sent to C.A. and the C.A. has opined that he received sealed packets. The report Exh.32 shows that 'B' group blood was found on the clothes of the accused. Admittedly, the blood stains which were found on the clothes of the deceased were also of 'B' group. So, this is another connecting link or circumstance to support the prosecution case.

18. Thus from the above discussion it is very clear that we are of the considered view that the reasoning given by the learned Trial Judge to discard the testimony of complainant eye witness Surrayya is not at all legal. Her evidence is not properly appreciated. On the contrary, testimony of Surrayya is not at all shaken or shattered in the cross-examination. It is her immediate version. There was no scope for her to concoct a story and to rope the accused falsely. The fact that the accused was found within short time from the incident and his clothes were blood stained also

lends support to the testimony of eye witness Surrayya. In our opinion, testimony of Surrayya is free from all taints and the same has to be accepted. It is well settled that conviction can be based even on the testimony of a single eye witness, when the evidence of such witness appears to be reliable and free from any doubt so we are of the view that findings recorded by the learned Sessions Judge acquitting the accused is not legal and correct. Hence we pass the following order.

O R D E R

(i) Appeal is allowed.

(ii) The order passed by the Sessions Judge, Kolhapur in Sessions Case No. 16/1988 acquitting the accused of the offence punishable under section 302 of IPC is set aside.

(iii) The accused is convicted for the offence punishable under section 302 of IPC and is sentenced to suffer R.I. for life and to pay fine of Rs. 500/- (Rupees Five Hundred Only) and in default, to suffer R.I. for one month.

(iv) The accused is entitled to get set of for a period

of detention undergone by him in connection with this case as per Section 428 of Cr.P.C.

(v) The accused to surrender before trial Court within four weeks from today failing which the trial Court to take necessary steps as per the Code of Criminal Procedure to arrest the accused and send him to jail to undergo the punishment mentioned above.

(vi) The accused to surrender forthwith. As he is not present in the Court, the trial court to take necessary steps as per the Code of Criminal Procedure to arrest the accused and send him to jail to undergo the punishment mentioned above.

(D.G. DESHPANDE,J.)

(S.R. SATHE,J.)